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IN THE

# Supreme Court of the United States

ABIGAIL NOEL FISHER,

*Petitioner*,

*v.*

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF *AMICI CURIAE* OF 39 UNDERGRADUATE AND GRADUATE STUDENT ORGANIZATIONS WITHIN THE UNIVERSITY OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Austin at Texas*, 133 S. Ct. 2411 (2013).

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Elise Boddie, Commentary on *Fisher*: The Importance of Diversity Within Diversity, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM), http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity ..... 10-11, 29

Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197 (2010) ..... 31

Grace Carroll et al., *Those Who Got in the Door: The University of California-Berkeley's Affirmative Action Success Story*, 69 J. NEGRO EDUC. 128 (2000) ..... 35

Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 25 RES. HIGHER EDUC. 529 (2004) ..... 29

Amy DeVaudreuil, *Review Essay, Silence at the California Law Review*, 91 CAL. L. REV. 1183 (2003) ..... 19, 23

Education Trust, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* (2010) ..... 24

Patricia Gándara, *California: A Case Study in the Loss of Affirmative Action*, The Civil Rights Project/Proyecto Derechos Civiles (Aug. 8, 2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action ..... *passim*

William C. Kidder, *Review Essay, Silence, Segregation, and Student Activism at Boalt Hall*, 91 CAL. L. REV. 1167 (2003) ..... 19

William C. Kidder, *Misshaping the River*, 39 J. COL. & UNIV. L. 53 (2013) ..... *passim*

William C. Kidder & Patricia Gándara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts*, Educational Testing Service (Oct. 2015), http://www.ets.org/Media/Research/pdf/kidder_paper.pdf ..... *passim*

Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. EDUC. REV. 338 (2010) ..... 37

Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 RES. HIGHER EDUC. 214 (2008) ..... 36

Regents of the Univ. of Cal., *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2* (2001), http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf ..... 13, 34

Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 CHICANO-LATINO L. REV. 29 (2008) ..... 20

Victor B. Saenz et al., *Factors Influencing Position Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1 (2007) ..... 30

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Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15 (2008) ..... 34

Univ. of Cal., Admissions, *A-G Courses*, http://admission.universityofcalifornia.edu/freshman/requirements/a-g-requirements/index.html (last visited Oct. 31, 2015) ..... 16

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Univ. of Cal. Office of the President Academic Affairs, Institutional Research and Academic Planning, *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014* (2015), http://www.ucop.edu/news/factsheets/ 2014/flow-frosh-ca-14.pdf ..... *passim*

Univ. of Cal. Office of the President Academic Affairs, Institutional Research and Academic Planning, *University of California: Application, Admissions and Enrollment of California Resident Transfers for Fall 1995 through 2014* (2015), http://www.ucop.edu/news/factsheets/2014/flow-trans-ca-14.pdf ..... 17-18

U.S. Dep't of Educ., Federal Pell Grant Program, http://www2.ed.gov/programs/fpg/index.html (last visited Oct. 31, 2015) ..... 26

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* ("*Amici*") represent numerous graduate and undergraduate student-run organizations that operate within the University of California educational system ("UC system" or "University"). They reflect a broad cross-section of students, including undergraduate and graduate students at the prestigious Berkeley and Los Angeles ("UCLA") campuses, and students at the five selective, well-known law schools administered by the University at Berkeley, UCLA, Davis, Irvine, and UC Hastings College of the Law.

Many of the *Amici* actively seek ways to ensure that the State of California provides and promotes educational, professional, and social opportunities for individuals of all races, genders, ethnicities, religions, and nationalities who seek enrollment in the State's university system, with particular focus on underrepresented racial minorities. Other of the *Amici* address legal and policy issues that are of unique concern and which affect segments of California's broad, multicultural citizenry traditionally underrepresented in higher education.

Because of their status as UC students, *Amici*

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[1] Pursuant to Rule 37.6, *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, and their counsel have made any monetary contribution to the preparation and submission of this brief. This brief is filed with the parties' written consent, copies of which are on file with the Clerk of the Court.

are uniquely positioned to offer insights into why admissions policies that narrowly consider race as one of many factors, such as the policy before the Court, satisfy strict scrutiny under this Court's precedent interpreting the Equal Protection Clause of the Fourteenth Amendment, and therefore are constitutional. All of the *Amici* have been affected by California's 1996 ballot initiative known as "Proposition 209," which amended California's constitution to prohibit the State's public undergraduate and graduate universities from considering race, ethnicity, or gender as any part of the admissions process. *Amici* have experienced the full range of adverse consequences that flow from such a prohibition.

*Amici* thus have a strong interest in bringing the California experience to the Court's attention to ensure that it is not replicated or enshrined in constitutional doctrine, given its failure to satisfy the State's compelling diversity interests. To avoid the negative consequences experienced in California, and because the admissions policies of the University of Texas at Austin ("UT") are constitutional, the decision of the Fifth Circuit should be upheld.

## *AMICI CURIAE* 39 UNDERGRADUATE AND GRADUATE STUDENT ORGANIZATIONS WITHIN THE UNIVERSITY OF CALIFORNIA*

Armenian Law Students Association – UC Berkeley School of Law

Asian American Law Journal – UC Berkeley School of Law

Asian Pacific American Law Students Association – UC Berkeley School of Law

Berkeley Journal of African American Law and Policy – UC Berkeley School of Law

Berkeley Journal of Gender, Law and Justice – UC Berkeley School of Law

Berkeley La Raza Law Journal – UC Berkeley School of Law

Boalt Hall Queer Caucus – UC Berkeley School of Law

Boalt Hall Student Association – UC Berkeley School of Law

Coalition for Diversity – UC Berkeley School of Law

First Generation Professionals – UC Berkeley School of Law

La Raza Law Students Association – UC Berkeley School of Law

National Lawyers Guild – UC Berkeley School of

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* Names of universities are provided for identification only and do not imply endorsement by the Regents of the University of California. The missions and interests of the *Amici* that are signatories to this brief are set out in the accompanying Appendix.

Law

South Asian Law Students Association – UC Berkeley School of Law

Women of Color Collective – UC Berkeley School of Law

Black Graduate Student Association – UC Berkeley

Society of Colombians – UC Berkeley

Black Law Students Association – UCLA School of Law

Chicana/o-Latina/o Law Review – UCLA School of Law

Disability Law Society – UCLA School of Law

La Raza Law Students Association – UCLA School of Law

National Black Law Journal – UCLA School of Law

National Lawyers Guild – UCLA School of Law

OUTLaw – UCLA School of Law

Filipino Law Students Association – UC Davis School of Law

La Raza Law Students Association – UC Davis School of Law

Lambda Law Students Association – UC Davis School of Law

Law Students Association – UC Davis School of Law

Asian Pacific American Law Students Association – UC Hastings College of the Law

Black Law Student Association – UC Hastings College of the Law

Chinese American Law Association – UC Hastings College of the Law

Hastings Students for Immigrants' Rights – UC Hastings College of the Law

La Raza Law Students Association – UC Hastings College of the Law

National Lawyers Guild – UC Hastings College of the Law

Pilipino American Law Society – UC Hastings College of the Law

Black Law Students Association – UC Irvine School of Law

Latina/o Law Student Association – UC Irvine School of Law

National Lawyers Guild – UC Irvine School of Law

OutLaw – UC Irvine School of Law

Women's Law Society – UC Irvine School of Law

## SUMMARY OF ARGUMENT

A university's promotion of diversity as a critical feature of its academic environment achieves the laudable goal of encouraging *all* students to expand their knowledge of the distinctive experiences that characterize individuals within both historically underrepresented minority groups, as well as ethnic and racial populations that have historically flourished in the collegiate setting. UT's enrollment program, which simply evaluates as one of many factors the prospective value that an *individual* candidate's ethnic or racial background presents to the educational experience of all other

UT students, is designed to accomplish this valuable and constitutionally sound goal.

UT's attempt to achieve the broadest forms of diversity throughout its campus system, including diversity within and among racial groups by careful evaluation of each candidate's many potential attributes, shows that its commitment to a holistic educational experience is sincere, and not driven by simplistic "racial balancing." UT is not enrolling students solely predicated upon their different racial and ethnic backgrounds. Nor is UT employing quotas. UT merely weighs, as one of many enrollment criteria, the educational value that candidates of different racial and ethnic experiences potentially offer other prospective and current students.

This is precisely the form of meaningful diversity that the Court embraced in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Indeed, the strength of the admissions program upheld in *Grutter* was that it "focused on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). UT's holistic admissions policy embraces the commendable goal of ensuring that the panoply of individual experiences a candidate offers other students produces not merely the very best applicants for enrollment, but ultimately the very best collective assemblage of students within the university system itself. UT's policy seeks to ensure that its admitted students reflect the full diversity of Texas, with a wide range of perspectives and

experiences represented not just among the student body as a whole, but also among members of the same racial and ethnic groups. Put another way, UT's admissions policy strives for diversity within diversity.

Unfortunately, not every university system is as effective or enlightened as UT's. California's experience under Proposition 209 is representative of the negative consequences of adopting an admissions policy in which some aspects of diversity, particularly race and ethnicity, are ignored. Twelve years ago, this Court cited California's experiment under the strictures of Proposition 209 in noting that race-conscious admissions policies should be evaluated periodically to determine if they "are still necessary to achieve student body diversity." *Grutter*, 539 U.S. at 342 (2003). Far from demonstrating that the time has come for the already limited consideration of race in the admissions process to be wholly abandoned, Proposition 209 has vindicated the reasoned position of Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978), affirmed by this Court in *Grutter*, that diversity remains an important component of the educational experience. Ensuring a diverse student body is a compelling state interest, and it is therefore both proper and necessary for race and ethnicity to be weighed as one of many elements in the admissions process. *Grutter*, 539 U.S. at 351 (citing *Bakke*, 438 U.S. at 265 (Powell, J.)).

Empirical evidence shows that since its enactment, Proposition 209 has continued to

undermine UC's own constitutionally sound state interest in creating a truly diverse student body. Immediately after the Proposition's enactment, enrollment of underrepresented minority[2] students at UC schools plummeted. Although some schools have recovered to pre-Proposition 209 levels for enrollment of certain underrepresented minorities, they still fall far short of the "critical mass" that UT seeks to achieve in this case. Moreover, top schools like Berkeley and UCLA still have not recovered to pre-Proposition 209 levels of diversity—even as the State of California becomes increasingly diverse in its general population.

The lack of adequate diversity in the UC system has diminished the educational experiences of UC students and created campuses that are less hospitable to those underrepresented minority students who do choose to enroll, while simultaneously greatly narrowing their paths to leadership roles. Moreover, many highly qualified minority students who are admitted to UC's elite schools spurn these offers in favor of private universities with much more diverse student bodies. The resulting "brain drain" harms not just *Amici* and other UC students, but also the State as a

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[2] "[U]nderrepresented minority" is a term defined by the University of California for resident groups that have "collectively achieved eligibility for the University . . at a rate below 12.5 percent." These include African Americans, American Indians, and Chicanos/Latinos. Univ. of Cal. Office of the President, Student Academic Servs., *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* 1 n.3 (2003), http://ucop.edu/student-affairs/_files/aa_final2.pdf(2003).

whole. These negative effects have occurred despite a wide array of race-neutral efforts by UC administrators to maintain diversity—many of which mirror UT's failed approaches prior to the adoption of its current holistic review. UC's race-neutral alternatives have not and cannot fully counteract the devastating effects of Proposition 209.

California's experience, including that of *Amici*, under Proposition 209 underscores why UT may constitutionally consider race as a part of a holistic admissions policy. Proposition 209 reveals the harms that may be *prevented* by UT's current admissions policies, and demonstrates why those policies satisfy strict scrutiny. As the Court advised states and campuses throughout the nation in *Grutter*, this Court today should continue to scrutinize and take heed from the negative experiences of the University of California when evaluating whether or not UT's admissions policy is, in fact, constitutional.

## ARGUMENT

For nearly four decades, this Court has held that diversity is a compelling state interest that can be achieved through narrowly tailored means, a position not challenged by Plaintiff.[3] *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2418-19 (2013)

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[3] Consistent with her first appearance before this Court, Petitioner does not now ask the Court to rule that diversity is invalid as a compelling interest. *See* Pet'r's Br. at 48 (requesting that the Court rule that consideration of race be a "last resort" but not seeking sweeping ruling against diversity).

("*Fisher I*"); *Grutter*, 539 U.S. at 325; *Bakke*, 438 U.S. at 314-15; *see also Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (noting both that "[i]n *Fisher [I]*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met," and also that "[i]n this case, as in *Fisher*, that principle is not challenged"). The Court recognizes that students of different backgrounds bring to campus "experiences, outlooks, and ideas that enrich the training of [a school's] student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314. Achieving such rich diversity requires multi-factored and multi-faceted analysis; it is not a simple numbers game. *Id.* at 315.

UT uses a nuanced strategy to reach its goal of diversity: it fills the vast majority of its freshman class by offering positions to the top ten percent of every high school's student body. It then fills the limited number of remaining spots by considering each applicant holistically. Race and ethnicity are among the many factors that admissions officers consider. This permits these decision-makers to more fully evaluate each applicant's entire range of attributes that may enrich the campus.

Broad diversity is important for a robust and enlightened academic setting. Indeed, "[t]he point of having broad diversity is to bring together people from different backgrounds so that they can experience each other as peers in a shared educational environment." *See* Elise Boddie,

Commentary on *Fisher*: The Importance of Diversity Within Diversity, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM), http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity. As Elise Boddie, former Director of Litigation of the NAACP Legal Defense and Education Fund, noted when this case was previously before the Court, fostering "diversity within diversity" provides "the opportunity for students to learn from, live with, and work alongside students from widely different backgrounds," and "helps students celebrate their differences and appreciate their similarities." *Id.* In short, "it advances the common-sense understanding that all people, including racial minorities, are unique in their own way." *Id.*

California's experience in the aftermath of Proposition 209 illustrates why the careful, limited approach taken by the University of Texas is appropriate, necessary, and constitutionally permissible. California has attempted to satisfy its compelling interest in diversity without considering race and ethnicity, but as discussed below, those attempts have fallen short. The State's race-neutral approaches have been expensive and administratively unworkable, and have failed to achieve a "critical mass" of underrepresented minority students in the University of California system, which not only "threaten[s] the educational benefits of diversity" but also "exacerbate[s] the harms of racial isolation." William C. Kidder & Patricia Gándara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts*, Educational Testing Service,

29, Oct. 2015, *available at* http://www.ets.org/Media/Research/pdf/kidder_paper.pdf.[4]

## I. CALIFORNIA'S EXPERIENCES IN THE AFTERMATH OF PROPOSITION 209 DEMONSTRATE WHY RACE-NEUTRAL POLICIES ARE NOT EFFECTIVE IN ACHIEVING DIVERSITY.

### A. Almost Twenty Years Ago, California Banned Consideration of Race and Ethnicity in Connection with Admissions to the University of California.

Prior to Proposition 209, California had a long history of considering diversity—including racial and ethnic diversity—in admissions decisions. In the early 1970s, the faculty of UC Davis School of Medicine initiated a "special admissions program" to remedy its lack of minority enrollees. 438 U.S. at 272. This Court struck down that particular program in *Bakke*. It nevertheless held that states have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320 (Powell, J.). Following that decision, many public colleges and

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[4] William Kidder is presently Assistant Provost and Assistant Executive Vice Chancellor at the University of California, Riverside. Patricia Gándara is a Research Professor at the Graduate School of Education at the University of California, Los Angeles; she is also Co-Director of The Civil Rights Project at UCLA. Dr. Gándara and Mr. Kidder have each researched diversity within the University of California system and the effects of Proposition 209 for many years.

universities, including California schools, continued to consider race as one of many factors in college admissions.

In 1995, however, the Regents of the University of California reversed course, adopting a resolution ("SP-1") that prohibited the University from considering race or ethnicity in admissions decisions.[5] The following year, California voters passed Proposition 209, which amended the California Constitution to prohibit preferential treatment on the basis of race, sex, and ethnicity in public employment, public contracting, and public education, including the University of California system.[6]

In response, the University abandoned any consideration of race or ethnicity in its admissions process, and "the entire apparatus of admissions within the University had to be changed." *See* Patricia Gándara, *California: A Case Study in the Loss of Affirmative Action*, The Civil Rights

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[5] SP-1 and a companion resolution were rescinded in 2001, years after Proposition 209 took effect. Regents of the Univ. of Cal., *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2* (2001), http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf. The repealing resolution, while acknowledging the limitations that Proposition 209 imposes, did note that the Regents intended for the University to "seek out and enroll, on each of its campuses, a student body . . . that encompasses the broad diversity of backgrounds characteristic of California." *Id.*

[6] *See* CAL. CONST. art. I, § 31. For ease of reference, *Amici* here refer generally to Proposition 209, noting where relevant the earlier University of California-specific ban.

Project/Proyecto Derechos Civiles 3 (Aug. 8, 2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action. The University of California system thus experimented "with a wide variety of alternative approaches." *Grutter*, 539 U.S. at 343. Despite its implementation of these alternatives, the University's inability to consider an applicant's race or ethnicity had an immediate and prolonged negative effect on UC's student body.

### B. The "Race-Neutral" Policies California Adopted as a Result of Proposition 209 Failed to Foster a Truly Diverse Student Body.

When the University of California banned the consideration of race in the admissions process, it experienced "substantial declines in the proportion of entering students who are African American, American Indian, and Latino." *Undergraduate Access*, *supra* note 2, at 28. For much of the last two decades, the University has attempted, through a wide range of "race neutral alternatives," to undo the damage caused by Proposition 209. These "alternatives" include, among other things, a "percentage plan" like the one used by the UT; a variation of "holistic" review without the ability to consider race or ethnicity; academic preparation programs; automatic transfer programs; targeted recruitment to encourage underrepresented minority admits to matriculate; and a focus on socioeconomic status. *See* Gándara, *supra*, at 10-18. These programs have curtailed some of the negative effects of Proposition 209, but they have failed to support

the University of California's compelling diversity interest.

### 1. The "Race-Neutral" Policies California Adopted in the Immediate Wake of Proposition 209 Did Not Achieve a Critical Mass of Diverse Students in California Schools.

California's first race-neutral plan aimed to connect with students early by "increas[ing] the preparation and enrollment of 'educationally disadvantaged' students." Gándara, *supra*, at 10. The outreach program paired underperforming high schools with nearby University campuses and invested further in student outreach efforts with supervision from University faculty. *See id.* at 10-11. From 1998 to 2001, the Legislature increased funding for this program, adding tens of millions of dollars to bring it to fruition. *See id.* at 4, 11; Kidder & Gándara, *supra*, at 3-4 (chart). At the program's height, total University and State expenditures on the program passed the $100 million mark. Kidder & Gándara, *supra*, at 3. That level of support was not sustainable, however, and by the early 2000s, funding began "a steady and precipitous decline." *See* Gándara, *supra*, at 11. What was meant as a "long term strategy" for reaching students throughout their primary and secondary education could not reverse the losses caused by Proposition 209 within the few years in which it was adequately funded. "[D]isillusion with the strategy" set in. *Id.* at 12.

More modest programs, given more time to succeed, have likewise failed. For example, the initial version of a percentage plan, known as "Eligibility in the Local Context" ("ELC") offered students in the top four percent of their class admission to a University campus (though not necessarily the one of their choosing).[7] The initial ELC plan failed to substantially increase the presence of underrepresented minority students: most who would have benefited from the program already qualified for admission.[8] *See id.* at 13-14; *see also Undergraduate Access*, *supra* note 2, at 25. In the end, this program "did not increase diversity by any discernible amount." Kidder & Gándara, *supra*, at 23. Similarly, a racially and ethnically

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[7] To be considered for freshman admission to the UC system (*i.e.*, "eligible"), a California resident must either: (1) complete fifteen high school courses ("a-g") with a grade of C or better; or (2) complete college courses or earn certain scores on SAT, Advanced Placement, or International Baccalaureate exams in the a-g course subject areas. Univ. of Cal., Admissions, *A-G Courses*, http://admission.universityofcalifornia.edu/freshman/requirements/a-g-requirements/index.html (last visited Oct. 31, 2015).

[8] In the current version of the ELC program, students in the top nine percent of their high school senior class (in a participating California high school), based on a GPA calculated by the University from a standardized set of courses, are awarded "ELC status," which "adds value to the application and is one of the 14 factors considered when applications are reviewed." Univ. of Cal., Admissions, *Local path (ELC)*, http://admission.universityofcalifornia.edu/freshman/california-residents/local-path/index.html (last visited Oct. 31, 2015). As with the prior version of the program, it "has not been especially successful," likely because "many of the schools from which [the University] would hope to draw a more diverse pool of students neither prepare nor encourage their students to apply" to the University. Kidder & Gándara, *supra*, at 23.

blind "quasi-holistic" review program had "weak effects" in increasing diversity of underrepresented minorities precisely because of the inability "to consider race and its concomitant effects on [an applicant's] competitiveness." Gándara, *supra*, at 13.

Another, still-active program permits certain high-performing students to transfer to a University campus after completing coursework at a two-year community college. But this too has failed to significantly further the University's diversity interest: from 2006 through 2014, for example, the University's incoming transfer class had an even *lower composite proportion* of African American, Latino, and American Indian students than the incoming freshman class.[9] *See* Univ. of Cal. Office of the President, Academic Affairs, Institutional Research and Academic Planning, *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, 1 (2015), http://www.ucop.edu/news/factsheets/ 2014/flow-frosh-ca-14.pdf; Univ. of Cal. Office of the President, Academic Affairs, Institutional Research and Academic Planning, *University of California: Application, Admissions and Enrollment of California Resident Transfers for Fall 1995 through 2014*, 1 (2015), http://www.ucop.edu/news/factsheets/ 2014/flow-trans-ca-14.pdf. Such programs have not proven to substitute for the consideration of race and

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[9] The transfer program is also necessarily limited in its ability to create a beneficially diverse environment, as transfer students are absent from freshman and sophomore classes. *See* Kidder & Gándara, *supra*, at 26.

ethnicity in admissions, given the "notoriously low" transfer and completion rates for California's community colleges. In fact, only about 17% of underrepresented minority students attending a California community college who intend to transfer to a four-year institution do so within six years. Kidder & Gándara, *supra*, at 26.

Since California banned consideration of race and ethnicity in University admissions, the "level of access" for underrepresented minority students otherwise qualified to attend the University has declined relative to other students. Kidder & Gándara, *supra*, at 34. The range of "race-neutral" approaches adopted by the University to date are revealing in their failure to foster a student body that achieves the University's, and the State's, compelling interest in diversity. *Id.* While some UC schools have returned—after many years—to their pre-Proposition 209 diversity levels, the ill effects of Proposition 209 are felt acutely, as discussed below, on the University's most selective campuses. In light of this twenty-year history, further experiments are not likely to produce "workable race-neutral alternatives." *Grutter*, 539 U.S. at 339; *cf. Fisher I*, 133 S. Ct. at 2421.

### 2. Strictly Race-Neutral Policies Have a Strikingly Negative Effect on Diversity at the University of California's Most Selective Schools.

Proposition 209 has had the most drastic effects on the two most selective of California's University campuses: UC Berkeley and UCLA.

After the Proposition's enactment, African American undergraduate enrollment dropped dramatically at Berkeley and UCLA among California residents, with freshman enrollment at UC Berkeley more than halving between 1997 and 1998.[10] *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra*, at 2. For example:

- At UCLA, African American undergraduate enrollment dropped by more than 37%, from 5.6% to 3.5% of the freshman class during the same period. *Id.* at 5.

- The proportion of African American freshman students enrolling at UCLA has still not returned to pre-Proposition 209 levels *Id.*

- At UC Berkeley, African American undergraduate enrollment has hovered

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[10] *See, e.g.*, William C. Kidder, *Review Essay, Silence, Segregation, and Student Activism at Boalt Hall*, 91 CAL. L. REV. 1167, 1173 (2003) (noting the "staggeringly low" levels of minority representation in the student body at UC Berkeley's Boalt Hall School of Law after passage of Proposition 209); Amy DeVaudreuil, *Review Essay, Silence at the California Law Review*, 91 CAL. L. REV. 1183, 1197-1200 (2003) (regarding minority representation on the law review). UC Berkeley, like UCLA, is "hyper-selective" and is able to admit far fewer than one-fifth of eligible California resident applicants from a very accomplished applicant pool. *See University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra* at 2, 5; *see also* José L. Santos et al., *Is "Race-Neutral" Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Educ. 605, 610 (2010).

between approximately 3% and 4% between 1998 and 2014, far below pre-Proposition 209 levels, which was approximately 6.5%. *Id.* at 2.

American Indian undergraduate enrollment also languishes far below pre-Proposition 209 levels. California is home to a significant portion of the American Indian population; nearly 1 out of every 6 American Indians is a California resident. Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 CHICANO-LATINO L. REV. 29, 30 (2008).[11] But the statistics related to American Indian enrollment trends at these schools are alarming:

- In 1995, both UC Berkeley and UCLA enrolled American Indian students in far greater numbers than the years following Proposition 209. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra*, at 2, 5.

- As of 2014, American Indian undergraduate enrollment at UC Berkeley and UCLA still remains over 45% lower than pre-Proposition 209 levels. *Id.*

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[11] Cruz Reynoso, a former Associate Justice of the California Supreme Court, is Professor Emeritus of Law at UC Davis's King Hall School of Law.

- In each and every year under Proposition 209 (1998 through 2014), there were fewer American Indian freshmen in the University system compared to 1995, even though the size of the overall freshmen class increased by more than half—from approximately 22,000 in 1995 to a peak of approximately 34,500 in 2008.[12] *Id.* at 1.

As with African American and American Indian students, Latino undergraduate enrollment also fell precipitously in the wake of Proposition 209 at Berkeley and UCLA:

- At UC Berkeley, Latino enrollment dropped from 16.9% to 8.2% of the freshman class—a staggering 52% decline in the years between 1995 and 1998. *Id.*

- By 1998, freshmen admissions offers for Latino students had dropped by 54% at UC Berkeley and by 46% at UCLA.[13] Kidder &

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[12] Most recently, American Indians represented only 0.6% of the University's incoming class, out of a class of approximately 33,800. Proportionally, American Indian freshman enrollment therefore dropped by 45%, from 1.1% to 0.6% between 1995 (pre-Proposition 209) and 2014. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra*, at 1.

[13] Admissions rates at UC Berkeley and UCLA for Latino students "only eclipsed 1995 levels in 2014." Kidder & Gándara *supra*, at 16. Although that trend, if it is not an anomaly, may be positive on its own, it remains true that the gap between Latino high school graduation rates and UC admissions rates, as set forth below, continues to grow,

Gándara, *supra*, at 16.

The proportion of Latino California public high school graduates almost doubled between 1990 (23%) and 2010 (44%), and has been increasing since then. *See* William C. Kidder, *Misshaping the River*, 39 J. Col. & Univ. L. 53, 88 (2013); Kidder & Gándara, at 21-22. As Latino students approach half of all California high school graduates, they constitute only one-fifth of UC Berkeley and UCLA admits (and just under 30% of University admits system-wide).[14] *See* Kidder & Gándara, *supra*, at 21-22; *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra*, at 2, 5. Indeed, the "magnitude of the gap between Latinos' proportion of public high school graduates and UC freshman offers" widened by a whopping 68% between 1995 and 2014. Kidder & Gándara, *supra*, at 16.

These racial and ethnic imbalances in the University system undermine the State's ability to

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demonstrating the continuing negative effects of Proposition 209.

[14] Although the act establishing the University in 1868 required "the Regents, according to population, to so apportion the representation of students, when necessary, that all portions of the State shall enjoy equal privileges therein," Kidder & Gándara, *supra*, at 1 (quoting the Organic Act), *Amici* note California's demographic trends not to suggest that UC enrollment must mirror the State's diversity in lockstep, but to place the percentage of Latinos enrolled in proper context. Some of Petitioner's *amici* "tend to obfuscate this important demographic driver of enrollment change when touting Prop[osition] 209." Kidder, *Misshaping the River*, *supra*, at 88.

achieve a truly diverse set of students, and thus to train a set of leaders from every race and ethnicity in the community. The imbalances also affect graduate school admissions. Immediately following the passage of Proposition 209, the number of African American applicants dropped dramatically at the University's most selective law schools. Kidder, *Misshaping the River*, *supra*, at 85; DeVaudreuil, *supra*, at 1197-1200. Between 1996 and 1998, African American applicants to Berkeley Law and UCLA School of Law dropped by over two-fifths, and significant drops occurred at UC Davis School of Law, and UC Hastings. Kidder, *Misshaping the River*, *supra*, at 85. Nearly fifteen years later, despite robust outreach efforts and increasingly diverse State demographics, applications by African Americans to UC law schools have remained below pre-Proposition 209 levels. *See id.* at 86; *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1995 through 2014*, *supra*, at 1.

The President and Chancellors of the University recently acknowledged to this Court several shortcomings in the University's professional graduate programs, including that African American, Latino, and American Indian students together constituted *only* 5.3% of the students enrolled in 2012 in the University's business schools. That is a rate much less than half the proportion enrolled at peer schools around the country (12.8%). *See* Brief *Amicus Curiae* of the President and Chancellors of the University of California as *Amicus Curiae* in Support of Respondents, *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682,

at 26 (Aug. 30, 2013). The President and Chancellors also reported that African American graduate business students comprised just 1.3% of enrolled business students in the 2012-13 school year. *Id.* Worse yet, "during five of the last seven academic years, one or more of [the University's] six business schools enrolled no African-American students at all." *Id.* at 26-27. The University's law and medical schools were similar: from 2001 to 2011, there were "certain years" in which the UC Irvine medical and law schools, the UCLA medical school, and the UC San Diego medical school did not have a single African American student. *Id.* at 27.

Along these lines, the gap between the racial and ethnic composition of California high school graduates and the makeup of the UC Berkeley student body was greater than every flagship state public university across the country except five, all of which are located in the Deep South and have historical legacies of *de jure* segregation. *See* Education Trust, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* 18 (2010); *Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962). These statistics are critical because where a student goes to school can greatly affect that student's likelihood of graduating. For instance, 80% of University students system-wide graduate within six years, with 88-90% of students at the more selective Berkeley and UCLA campuses doing so. Kidder & Gándara, *supra*, at 1. By contrast, students who attend a less selective four-year public campus have only a 45% chance of graduating within the same timeframe. *Id.* Only 17% of community college students will even

transfer to a four-year institution, and fewer still will earn their degree. *Id.*

These statistics are most troubling in light of this Court's observation in *Grutter* that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. Yet in California, as a result of the difficulty underrepresented minority students have in accessing the University system and its most selective campuses, the pathway to leadership is increasingly difficult for potential candidates to see. For those who do attend the top schools, the limited representation of minority viewpoints fails to provide the "exposure to widely diverse people, cultures, ideas, and viewpoints" that this Court in *Grutter* recognized is necessary to develop "the skills needed in today's increasingly global marketplace." *Id.* at 330-31. Racially neutral admissions policies have failed to achieve the diversity on University campuses critical for California's future. Moreover, such policies have in many instances fostered an environment of racial isolation inconsistent with the State's compelling interest in diversity.

### 3. Admissions Policies Geared Toward Socioeconomic Status Do Not Achieve and Cannot Approximate the Diversity Benefits of Race-Conscious Policies.

Petitioner and certain *amici* contend that greater use of race-neutral programs based on

socioeconomic status will further the University of Texas's interest in diversity. *See, e.g.*, Fisher Opening Br. at 24 ("UT could have achieved similar gains through a number of race-neutral means, such as . . . making greater use of socioeconomic preferences"); Br. *Amicus Curiae* Pacific Legal Foundation at 24-25; Br. *Amicus Curiae* Richard D. Kahlenburg at 23-24. California's experience following Proposition 209 suggests that such programs will not have that effect.

Policies related to socioeconomic status cannot approximate the salutary diversity effects of the limited and appropriate consideration of race. This is evident from California's experience, because the University presents "close to an optimal 'natural experiment'" to test whether socioeconomic-based admissions policies can create an underrepresented minority presence that meaningfully advances the State's diversity interest in any context. Kidder, *Misshaping the River*, *supra*, at 114. The University has a much higher percentage of low-income students than other schools around the country: almost one in three University students is a Pell Grant[15] recipient—double the proportion at the University's peer schools. *Id.* The University also invests substantially in the education of low-income

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[15] A federal Pell Grant is a need-based grant awarded by the U.S. government to undergraduate students to promote access to postsecondary education. U.S. Dep't of Educ., Federal Pell Grant Program, http://www2.ed.gov/programs/fpg/index.html (last visited Oct. 31, 2015). According to these numbers, the University should be able to achieve the broad diversity it desires under a "socioeconomic status" plan. As the empirical data bear out, however, that has not been the case.

students: 90% of its financial grants and scholarships are need-based, and students have access to both State and school grants. *See id.* at 115. Despite these efforts, the decline in the admission and enrollment of underrepresented minority students immediately following the enactment of Proposition 209—and continued failure to recover at the State's top public schools, demonstrate that socioeconomic and racial diversity are not coextensive. *See Id.* at 114.

An admissions policy based on socioeconomic status cannot account for the "multigenerational effects" of past racial discrimination and denied opportunity. *See* Gándara, *supra*, at 14. For example, some low-income students may nevertheless have the benefit of growing up in communities with stronger schools. Others, particularly those from racial groups traditionally well-represented among the ranks of college graduates, may have comparatively well-educated parents and relatives able to guide them through college preparation. By contrast, low-income students from historically underrepresented groups may not have such advantages. *See id.* 15-16.

Furthermore, socioeconomic status cannot account for the vast array of life experiences and perspectives held by members of the same race. As *Grutter* recognized, a faithful implementation of the compelling diversity interest must include steps to combat any "stereotype[]" that "minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333 (quoting Br. for

Respondent). For this reason, indicia of socioeconomic status are best considered alongside—not in lieu of—information about an applicant's race.

## II. INCREASED INTERRACIAL AND INTRARACIAL DIVERSITY PROMOTES A POSITIVE LEARNING ENVIRONMENT THAT ATTRACTS AND RETAINS HIGHLY QUALIFIED STUDENTS.

A diverse campus promotes a positive learning environment because it exposes students to the varied cultures that comprise our nation. Using a holistic approach that pursues both interracial and *intra*racial diversity (*i.e.*, "diversity within diversity") gives students better access to a truly diverse learning environment. Achieving this goal is critical: the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation." *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

Data available from the UC system and other schools around the country demonstrates the many and varied positive effects that flow from promoting campus diversity as a component of the school's educational program. Beyond mere numbers, it leads to a better racial climate and draws highly-qualified applicants to campuses. The flipside, as experienced by the UC system after Proposition 209, is a decrease in racial tolerance on campuses and a disturbing "chilling effect"—the flight of highly qualified underrepresented minority candidates to

more diverse private institutions.[16]

### A. Increased Diversity Creates a More Vibrant and Tolerant Educational Climate.

Considering the values attendant to both interracial and intraracial diversity is crucial to achieving the full educational benefits promoted by "diversity within diversity" on campus. First, considering intraracial diversity as one element in admissions decisions can ensure that minority students on campus are internally diverse, dispelling stereotypes by revealing the vast differences between students within various groups. *Grutter*, 539 U.S. at 333; Boddie, *supra*, at 1.

In addition, intraracial diversity increases opportunities for cross-racial interactions on campus by ensuring that all students engage in the full array of classes, extracurricular activities, interest groups, and conversations that form the building blocks of campus life. Importantly, fostering cross-racial interaction in all of its different forms must be a nuanced process as the student body becomes increasingly diverse. *See* Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 545 (2004).

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[16] Consistent with the "chilling effect" on enrollment of underrepresented minority students, the UC system experienced an immediate and drastic decline in freshman applications by underrepresented minorities, in what some call an "anticipatory chilling effect" to Proposition 209 between 1995 and 1997. Kidder & Gándara, *supra*, at 13-14.

As foreseen and anticipated by this Court, increasing the frequency of cross-racial interactions has enormous positive effects on students. For example, higher levels of such interactions lead to greater cognitive development, higher graduation rates, growth in leadership skills, and higher levels of civic interest. *Id.* at 530. In addition, the presence of diverse peers enhances students' democratic skills and ability to negotiate differences. Victor B. Saenz et al., *Factors Influencing Position Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 36 (2007). Indeed, even students with positive ethnic attitudes or high interethnic contact at the beginning of their college experience can prevent the later development of any undesirable biases because a diverse educational setting promotes new interethnic interactions and friendships. Jim Sidanius et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* 196-97 (2008) (citing a landmark social sciences study of UCLA students who enrolled in the fall of 1997 and evaluated through their graduation four to five years later).

Data from UC and other institutions also demonstrates the need for a diverse student body to ensure a racially tolerant learning environment, which is essential to recruiting and retaining diverse students, and to ensuring their ultimate success:

- Across the UC system, from 2008 to 2010, only 62.2% of African American students and 77.2% of Latinos reported feeling that students of their race are respected on

campus. *See* Kidder, *Misshaping the River*, *supra*, at 61-62.

- By contrast, 92.6% of white students on UC campuses and 96.4% of whites at UT reported feeling accepted. *Id.*

- At UT, where race is considered in admissions, 72.3% of African American and 89.9% of Latino students reported feeling respected on campus. *Id.*

Moreover, at least one empirical study revealed that banning any consideration of race in admissions decisions is linked to higher levels of negative experiences for minority students. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1221 (2010). For example, students attending schools that do not consider race in admissions are nearly twice as likely to experience overt racism compared to students who attended schools that permitted the consideration of race. *Id.* Students in more diverse classrooms are "least likely to: (1) encounter overt racism from faculty and students; (2) have their qualifications questioned; (3) feel pressure to succeed because of race; and (4) feel faculty have lower expectations of them." *Id.* at 1243. These same students are also "most likely to: (1) believe that neither faculty nor students thought minority students got into college because of affirmative action; (2) say they fit into the college population . . . ; (3) rate their ability to succeed as high; and (4) feel encouraged to speak about their career aspirations." *Id.* Again, these are exactly the

goals that this Court's precedent anticipated would be promoted by valuing diversity as one of many factors in the admissions process.

### B. Data Indicates Highly Qualified Underrepresented Minority Applicants Reject UC Schools in Favor of Private Universities with Admissions Policies that Consider Race and Ethnicity.

This Court made clear in *Grutter* that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. While that path may be available to some highly qualified underrepresented minority candidates in the UC system, many of those candidates enroll instead in private universities with more diverse campuses. This trend has hurt the State of California as a whole, creating a *de facto* "brain drain" of future leaders for the State.

Data indicates that Proposition 209 had a strong "chilling effect" on underrepresented minority enrollment. In the past decade under Proposition 209, African Americans in the top third of the admissions pool were twice as likely as UC prospects to enroll at a private selective institution that embraced affirmative action in its admissions process. Kidder, *Misshaping the River*, *supra*, at 80-82. In fact, since Proposition 209, among UC Berkeley, UC Davis, UC San Diego, and UC Santa Barbara, there were twelve instances where *not a*

*single one* of the African Americans in the top third of the prospective admissions pool enrolled. *Id.* at 77.

In addition, underrepresented minority students in the top third of the University of California's freshman admits are increasingly more likely than non-underrepresented minority students to choose a private selective university over a UC school.[17] *Id.* at 70. In 1998, for example, only about 16% of top underrepresented minority applicants opted to attend a selective private university. *Id.* at 80 (table 2). By 2008, the proportion of top underrepresented minority applicants who chose to attend selective private universities grew to 34%. *Id.* In contrast, in 1998, only about 11% of non-minority applicants spurned UC. And by 2008, that percentage rose to only about 19%. *Id.*

The "no show" rate is particularly high for the most qualified African American students. *Over half* of African Americans in the top third of UC's 2005 freshman admit pool chose to attend a private selective university, while only 26.1% of African American admits in this same group opted to attend a UC school. Susan A. Wilbur, *Investigating the College Destinations of University of California Freshman Admits*, *in* EQUAL OPPORTUNITY IN

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[17] Top third refers to students offered admission to the University of California possessing academic credentials among the top one-third of all students offered admission to the UC system. This top third of students generally has the best enrollment choices within the UC system and at other institutions, such as elite private universities. Kidder, *Misshaping the River*, *supra*, at 71.

HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209, 63, 72 (Eric Grodsky & Michal Kurlaender eds., 2010).[18]

The loss of these top underrepresented minority admits hampers the University's ability to produce graduates equipped to lead California's increasingly diverse citizenry. "[N]umerous studies show that student body diversity . . . better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted). And, as noted above, campus diversity correlates with a more racially tolerant climate. California's experience under Proposition 209 indicates that underrepresented minority students are keenly aware of these benefits and have been "voting with their feet" in rejecting UC offers of admissions in favor of more diverse institutions. *See* Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15, 23 (2008). In fact, the UC Regents specifically recognized this chilling effect when they rescinded SP-1 (the precursor to Proposition 209) in 2001, explaining that the resolution caused some "individuals [to] perceive that the University does not welcome their enrollment at its campuses." *Future Admissions*, *supra* note 5, at 1.

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[18] Of the remaining 25%, 1.9% enrolled in California State University and 3.8% enrolled in a private non-selective university. For 17.5% of the admitted students, their college destination was unknown. Wilbur, *supra*, at 72.

The resultant "brain drain" affects not only the remaining students who do enroll at UC, but also the State as a whole. Many of these highly qualified individuals leave California in favor of more hospitable out-of-state institutions. Indeed, universities can "survive but not thrive without diversity." Grace Carroll et al., *Those Who Got in the Door: The University of California-Berkeley's Affirmative Action Success Story*, 69 J. NEGRO EDUC. 128, 140 (2000) (qualitative study of African American, Chicano/Latino, and Filipino students at UC Berkeley in the 1980s and 1990s).

## III. IN THE AFTERMATH OF PROPOSITION 209, CALIFORNIA HAS LOST HIGHLY QUALIFIED UNDERREPRESENTED MINORITY STUDENTS.

Some *amici* suggest that race-neutral approaches actually benefit underrepresented minority candidates because those candidates are better "matched" to less selective institutions. *See, e.g.*, Br. *Amicus Curiae* Gail Heriot & Peter N. Kirsanow, at 22-25; Br. *Amicus Curiae* Pacific Legal Foundation et al., at 17-21. This so-called "mismatch" theory implies that underrepresented minority admits to more selective institutions, lacking the requisite elite "credentials" (such as higher GPAs or standardized test scores), struggle throughout their academic careers. That is, underrepresented minority students at elite institutions are unable to keep up with their peers, lose confidence, and either perform poorly or drop out altogether. *See* Br. *Amicus Curiae* Gail Heriot & Peter N. Kirsanow, at 22-24.

But various studies provide empirical evidence that the "mismatch" theory is nothing more than a myth. Indeed, underrepresented minority students graduate at *higher* rates when they attend selective institutions. *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294, 309 (2005) (rebutting the "mismatch" hypothesis by finding that minorities' likelihood of graduation increased as selectivity of institution attended rose); Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 RES. HIGHER EDUC. 214, 217 (2008) (finding that minority students who were admitted to highly selective institutions under affirmative action policies were more likely to graduate).

Notably, one study found that selectivity was an important factor with a statistically significant effect on African American graduation rates. Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 SOC. SCI. RES. 1257, 1272 (2007). Not only did it increase the probability of graduation for African American students, it also helped African American students more than their white counterparts. *Id.*

Ultimately, higher graduation rates of underrepresented minority students from selective institutions lead to higher returns in the labor market. A study analyzing cohorts of students from the 1970s to the 1990s found "increasing labor

market returns to both years of education and college quality." Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. EDUC. REV. 338, 346 (2010). Attending a higher quality college increases the likelihood of graduating and increases earning power, particularly among African Americans and Latinos. *Id.* It follows that an admissions system that prohibits the consideration of race and ethnicity—like that in the University of California—leads to harms far beyond inhibiting the growth of campus diversity, with the student body, the community, and the State's economy also bearing the brunt of such policies. California's experience under Proposition 209 underscores the wisdom of this Court's prior precedent appreciating that diversity has an important role in the admissions process, and in producing a more well-rounded and educated populace.

## CONCLUSION

This Court need not speculate as to what a state university system might look like where the values attendant with considering diversity in a race-neutral fashion are eliminated. The UC example in the wake of Proposition 209 illustrates that race-neutral admissions policies do not foster a truly diverse educational environment—an impact felt more acutely on more selective campuses—and they severely narrow pathways to leadership in the State. Texas has designed a narrowly tailored scheme to avoid that undesirable effect, and for that reason its efforts survive constitutional review.

Taken together, the data and the policy implications from the University of California's experience under Proposition 209 demonstrate that racial and ethnic diversity are necessary components of a thoughtful admissions plan. *Amici* urge the Court to look once again to the University of California experience to understand the limits of relying upon good-faith, race-neutral efforts alone, and to reject any argument that would potentially result in the imposition of those failed restrictions throughout the land.

Respectfully submitted,

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## APPENDIX*

| *AMICI* NAME | ORGANIZATIONAL MISSION |
|---|---|
| Armenian Law Students Association – UC Berkeley School of Law | The mission of the Armenian Law Students Association at Berkeley Law is to provide a platform for community-building at Berkeley Law for students of Armenian descent and those interested in Armenian culture as well as to educate the greater community about Armenian culture, history, government, and legal issues of interest to the Armenian community. |
| Asian American Law Journal – UC Berkeley School of Law | In advancement of the Asian American movement, the Asian American Law Journal (AALJ) recognizes the diversity among Asian American and Pacific Islander communities and cultivates scholarship that promotes understanding and empowerment to foster resistance to oppression and achievement of justice. In solidarity with all peoples who have been subordinated, AALJ publishes works that address issues relating to all marginalized communities. |

* Names of universities are provided for identification only and do not imply endorsement by the Regents of the University of California.

| *AMICI* NAME | ORGANIZATIONAL MISSION |
|---|---|
| Asian Pacific American Law Students Association – UC Berkeley School of Law | Berkeley Law's Asian Pacific American Law Student Association (APALSA) is dedicated to serving the Asian and Pacific Islander American community at Berkeley Law and the Asian Pacific American community at large. APALSA's goal is to promote a greater awareness of the diverse culture, rich history, and current struggle of Asian Pacific Americans. |
| Berkeley Journal of African American Law and Policy – UC Berkeley School of Law | The Journal provides a scholarly forum to debate and propose solutions to issues affecting disenfranchised people, particularly African-Americans. The Journal publishes social policy and legal scholarship addressing economic, political, philosophical, and sociological issues affecting African-Americans. |
| Berkeley Journal of Gender, Law and Justice – UC Berkeley School of Law | Berkeley Journal of Gender, Law and Justice publishes feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to, race, class, sexual orientation, and disability. |

| *AMICI* NAME | ORGANIZATIONAL MISSION |
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| Berkeley La Raza Law Journal – UC Berkeley School of Law | The Berkeley La Raza Law Journal produces knowledge, centered on Latina/o conditions, communities, and identities, designed to capture the imagination of legislators, stir the consciences of judges, and provide a dynamic tool for practitioners concerned with the impact of their work on behalf of the Latina/o community. |
| Boalt Hall Queer Caucus – UC Berkeley School of Law | Founded in 1978, the Queer Caucus works to eradicate the oppression of LGBTQ people and to support students of diverse sexual orientations and gender identities. We strive to provide social opportunities for our members, support queer scholarship, and organize events relating to political, social, and legal issues affecting the queer community. |
| Boalt Hall Student Association – UC Berkeley School of Law | The Boalt Hall Student Association represents the collective interests of Berkeley Law students before the faculty and administration of Berkeley Law, the University of California and the public at large. |

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| Coalition For Diversity – UC Berkeley School of Law | The Coalition for Diversity and Inclusion (CFD) is committed to the recruitment, retention and thriving progression of students of color, low-income students, disabled students, LGBTIQ students, gender non-conforming students, immigrant students, and first-generation college students. CFD achieves this through inclusive programming, alliance building among affinity organizations, and advocacy on behalf of diverse students at Berkeley Law. |
| First Generation Professionals – UC Berkeley School of Law | First Generation Professionals (FGP) is a student-led group that strives to address the needs of first generation law students through mentorship, career advising, and social activities. Born of the common experiences and challenges of students from working-class backgrounds who are often the first in their family to attend college. FGP is a truly diverse community that fosters inclusiveness, well-being, and academic achievement throughout the Berkeley School of Law. |

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| La Raza Law Students Association – UC Berkeley School of Law | La Raza Law Students Association seeks to empower Latina/o students. By studying law with *conocimiento*, we learn how to shape the law to enhance our diverse communities' cultural, economic, political, social, and spiritual vitality. La Raza facilitates members' diverse legal interests by maintaining an inclusive environment where members can engage deeply their studies and each other. |
| National Lawyers Guild – UC Berkeley School of Law | The National Lawyers Guild, Berkeley Law Chapter, is an association of progressive law students dedicated to the fight for civil rights, social justice, and the elevation of human rights over property interests. |
| South Asian Law Students Association – UC Berkeley School of Law | The UC Berkeley South Asian Law Students Association (SALSA) represents the interests of law students of South Asian descent at Berkeley Law. Further, SALSA is committed to advancing the interests of South Asians through both law and policy in the United States, South Asia, and beyond. |

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| Women of Color Collective – UC Berkeley School of Law | The Women of Color Collective (WOCC) provides a supportive space for African-American, Asian-American, Latina, Native-American, other women, and transgender students of color at Berkeley Law. Through cultural, social, professional, educational and community service programs, WOCC enriches the educational experience at Berkeley Law by advancing the needs of women and transgender students of color. |
| Black Graduate Student Association – UC Berkeley | The Black Graduate Student Association (BGSA) is a cross-disciplinary graduate student group with a vested interest in providing opportunities for networking and community building for graduate students from the Black/African Diaspora(s) at Berkeley. BGSA's creation was sparked by graduate students' firm desire to address various concerns of the Black community both inside and outside of the University. |

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| Society of Colombians – UC Berkeley | The purpose of this organization is to create an interesting and stimulating environment for students at UC Berkeley, and promote the Colombian culture through social and cultural activities. Its purpose is also to educate other students about the Colombian culture and to provide a sense of a "home away from home" for Colombian undergraduate and graduate students. This organization provides a space for cultural exchange and growth for its members. |

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| Black Law Students Association – UCLA School of Law | The mission of the UCLA Black Law Students Association (BLSA) is to recruit Black students into the law school; articulate and promote the professional needs and goals of Black law students; focus upon the relationship of the Black law student and the Black attorney to the American legal structure; instill in the Black attorney and law student a greater awareness and commitment to the needs of the Black community; influence the legal community to bring out meaningful change to meet the needs of the Black community; and create a supportive environment for BLSA members. |
| Chicana/o-Latina/o Law Review – UCLA School of Law | Over the last 30 years, the *Chicana/o-Latina/o Law Review (CLLR) has provided an essential forum* for the discussion of central issues affecting the Latino community that mainstream law journals continue to ignore. CLLR has established a reputation for publishing strong scholarly work on affirmative action and education, Spanish and Mexican land grants, environmental justice, language rights, and immigration reform. |

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| Disability Law Society – UCLA School of Law | Disability Law Society (DLS) is a safe space for students with and without disabilities interested in disability law and policy. DLS serves all people with disabilities, ranging from physical, intellectual/developmental, and mental health. DLS works to foster awareness and professional development for those interested in disability law, through programming and networking opportunities. |

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| La Raza Law Students Association – UCLA School of Law | The UCLA La Raza Law Students Association actively recruits Latina/o applicants to the UCLA School of Law; provides academic, social, and moral support for Latina/o law students to ensure the graduation of La Raza law students; educates Raza students about underserved legal areas and communities; advocates for the recruitment of Latina/o faculty; provides an arena for Raza women to discuss multiple forms of oppression; and advocates for the admission of Latina/o students. |
| National Black Law Journal – UCLA School of Law | The National Black Law Journal (NBLJ) at UCLA School of Law has been committed to scholarly discourse exploring race and the law since 1970, when five Black law students and two Black law professors formed the journal in the wake of the Civil Rights Movement. NBLJ was the first journal in the country dedicated to studying the intersection of law and race. |

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| National Lawyers Guild – UCLA School of Law | The National Lawyers Guild, UCLA Chapter, is dedicated to the need for basic change in the structure of our political and economic system. The Guild unites lawyers, law students and legal workers as an effective political and social force in the service of the people. |
| OUTLaw – UCLA School of Law | OUTLaw promotes education, scholarship, advocacy, and participation in civic and social activities by and for the lesbian, gay, bisexual, transgender, and allied community at the UCLA School of Law and provides leadership and networking opportunities for its members. |
| Filipino Law Students Association – UC Davis School of Law | The purpose of the Filipino Law Students Association is to educate the Law School community and UC Davis about legal issues affecting Filipinos and Filipino Americans. |

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| La Raza Law Students Association – UC Davis School of Law | La Raza Law Students Association of UC Davis School of Law (LRLSA) is dedicated to increasing the number of Chicanos and Latinos in law schools and the law profession. LRLSA provides a supportive environment for Raza law students to succeed, and serves as a forum for Raza law students to share their culture and identity with other law students. |
| Lambda Law Students Association – UC Davis School of Law | The Lambda Law Students Association is a collective group of LGBTQIA-identified and allied-identified students, staff, and faculty at UC Davis School of Law. Lambda's three chief goals are community, education and activism. To that end, we sponsor a wide variety of events throughout the year designed to foster awareness of LGBTQIA issues and to promote the LGBTQIA legal agenda. |

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| Law Students Association – UC Davis School of Law | The Law Students Association (LSA) is the UC Davis School of Law's student government. The LSA's mission is to increase the value of the legal education offered at King Hall. LSA works toward improving student life, addressing student concerns, and acting as a liaison among the students and the faculty, administration, and alumni. |
| Asian Pacific American Law Student Association – UC Hastings College of Law | Asian Pacific American Law Student Association (APALSA) supports Asian/Pacific Islander students at UC Hastings by providing career and academic support, mentorship, and opportunities for networking with peers, alumni, and the larger Asian/Pacific Islander legal community. APALSA also addresses the issues and legal needs of the larger Asian/Pacific Islander community through community service and recruiting Asian/Pacific Islander students. |

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| Black Law Students Association – UC Hastings College of Law | UC Hastings' Black Law Students Association (BLSA) aims to articulate and promote the professional needs and goals of Black law students at the University of California Hastings College of Law. BLSA provides an environment promoting unity and camaraderie among Black law students. Additionally, BLSA aims to influence society as well as the legal community to bring about meaningful change in the legal system to meet the needs of the Black community while creating and maintaining active relationships between Black law students and Black attorneys. |
| Chinese American Law Association – UC Hastings College of Law | The Chinese American Law Association (CALA) seeks to create awareness and understanding of Chinese law and culture within the UC Hastings community. CALA seeks to promote diversity and highlight legal issues concerning Chinese communities and legal developments in the United States and China; present networking and pro bono opportunities to its members; and encourage involvement with the local Chinese community. |

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| Hastings Students for Immigrants' Rights – UC Hastings College of Law | The mission of Hastings Students for Immigrants' Rights (HSIR) is to help students translate an immigration law interest into an immigration law career. Our purpose is to provide our members opportunities to engage directly with the immigration legal community and gain experience as advocates themselves. HSIR educates our members and the broader Hastings community about the immigration field and connects our members with attorneys active in the field. |
| La Raza Law Students Association – UC Hastings College of Law | The La Raza Law Students Association is dedicated to promoting diversity in the law school classroom and the legal profession. As an organization, La Raza finds its strength in the diversity and dedication of its members. Though individually we have different backgrounds and perspectives, collectively we share the same vision of success for Latina/os in the legal community, other professions, and academia. |

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| National Lawyers Guild – UC Hastings College of Law | The UC Hastings chapter of the National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of the United States in an organization that functions as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. |
| Pilipino American Law Society – UC Hastings College of Law | The Pilipino American Law Society (PALS) is a student organization at UC Hastings College of Law. PALS was started to address legal and social issues relevant to the Pilipino American community, but we welcome all individuals, regardless of ethnic background, who are interested in Pilipino American issues and increasing cultural diversity in the legal profession. |

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| Black Law Students Association – UC Irvine School of Law | The Black Law Students Association (BLSA) at UC Irvine School of Law is an affiliate of the National Black Law Students Association. BLSA creates a supportive environment for Black law students at UCI Law and encourages the academic success and promotes the professional needs of Black law students at UCI Law. BLSA also creates and maintains active relationships with the UC Irvine and Orange County communities by organizing educational programs, community outreach activities, and mentorship opportunities. |
| Latina/o Law Student Association – UC Irvine School of Law | The Latina/o Law Students Association at UC Irvine School of Law is an inclusive organization, open to any student, regardless of racial or ethnic identification. We believe it is important to address issues that affect Latinos at both an institutional level and in the community. Our mission is to confront these issues through community service, mentorship, coalition building, and networking. |

| *AMICI* NAME | ORGANIZATIONAL MISSION |
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| National Lawyers Guild – UC Irvine School of Law | The National Lawyers Guild—UC Irvine Student Chapter, is a student organization, predominantly made up of law students, that seeks to unite with lawyers, legal workers, and jailhouse lawyers to function as an effective force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. |
| OutLaw – UC Irvine School of Law | The purpose of UCI OutLaw is to promote education, scholarship, advocacy, and participation in civic and social activities by and for the lesbian, gay, bisexual, transgender, and allied community at the University of California Irvine School of Law and to provide leadership and networking opportunities for its members. |
| Women's Law Society – UC Irvine School of Law | The mission of the Women's Law Society is to promote the academic, personal and professional development of women law students and to encourage thoughtful discussion of issues related to gender, law, and society. |